No. 80-1616

JUN 9 1981
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1980

AKIKO TAKIZAWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's invocation of her Fifth Amendment privilege at an Internal Revenue Service interview was properly admitted into evidence during the government's case at trial to show that petitioner understood the proceedings at the interview.

2. Whether the district court properly handled petitioner's deliberate violation of the reciprocal discovery rule.

3. Whether the trial judge's conduct deprived petitioner of a fair trial.

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OPINIONS BELOW

The court of appeals' order (Pet. App. 1a-4a) is not reported. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1980, and a petition for rehearing was denied on January 21, 1981. The petition for a writ of certiorari was filed on March 23, 1981 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of willfully attempting to evade and defeat her income taxes, in violation of 26 U.S.C. 7201, and one count of perjury in connection with her application to the Immigration and Naturalization Service for status as a

permanent resident alien, in violation of 18 U.S.C. 1546. She was sentenced to concurrent terms of five years' imprisonment on each count, all but three months of which was suspended in favor of unsupervised probation. She was also fined $22,000. The court of appeals affirmed (Pet. App. 1a-4a).

The evidence at trial showed that petitioner was a prostitute operating on the East Side of Manhattan. A number of her customers testified that they hired her in that capacity and paid her anywhere from $50 to $200 for her services. Payment was usually in cash and sometimes by checks made payable to cash. During 1973 and 1974, petitioner maintained at least five bank accounts into which she deposited a portion of her earnings from prostitution. The government employed the bank deposits method of proof to determine petitioner's gross income, and bank records alone revealed that petitioner had gross income of more than $29,000 in 1973 and more than $34,000 in 1974. Petitioner did not file income tax returns or pay taxes for either of those years.

The evidence also showed that on her written application for permanent resident status, filed with the INS in 1979, petitioner answered negatively the question whether she had ever engaged in "commercialized sexual activity." The sufficiency of the evidence to support petitioner's convictions is not disputed.

During defense counsel's opening remarks at the beginning of trial, he stated that petitioner had failed to pay her taxes because her attorney at the time had advised her not to file an income tax return and not to report her income from prostitution (Tr. 34-37A). Defense counsel further stated that the same attorney had prepared petitioner's application for permanent resident status and that she had signed the form in reliance on "the integrity and the knowledge and the professional skill of this lawyer" (Tr. 35).

In an effort to rebut the defense thus announced by counsel (and later advanced through petitioner's own testimony (Tr. 592-594)), the government presented in its case-in-chief the testimony of Internal Revenue Service Special Agent Michael Contrastrano. The agent testified that in May 1977 he and two other IRS agents interviewed petitioner. She was accompanied at the interview by a Japanese interpreter and by the attorney who allegedly had advised her not to file any tax returns (Tr. 244-245). During the interview, petitioner made numerous false statements concerning the amount and sources of her income during 1973 and 1974 (Tr. 248-258). In addition, in response to four specific questions, petitioner refused to answer and invoked her Fifth Amendment privilege against compulsory self-incrimination.[1] Because defense counsel previously had asserted that petitioner's defense would be a lack of personal understanding of her tax problems and a good-faith reliance on the advice of her attorney, the prosecutor sought to elicit testimony from Agent Contrastrano concerning petitioner's invocation of her Fifth Amendment privilege. The government offered this evidence only for what it tended to show about petitioner's comprehension of her legal affairs, not to suggest that petitioner had engaged in any wrongdoing with respect to the matters covered by the questions she refused to answer. The district court admitted the proffered testimony and gave a detailed limiting instruction explaining to the jury the narrow purpose for which the testimony was to be considered (Tr. 264-268).

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[1]The four questions that petitioner refused to answer concerned (i) the amount of money she brought with her when she came to the United States from Japan; (ii) a loan she made to another government witness in 1973; (iii) her acquaintance with four named women; and (iv) her use of a telephone answering service (Tr. 269).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 50-53), the district court properly admitted Agent Contrastrano's brief testimony regarding petitioner's invocation of her Fifth Amendment privilege at the IRS interview in May 1977.[2] The testimony was relevant for at least two reasons. First, it showed that petitioner understood the proceedings at the interview well enough to know when she wished to invoke her privilege, thereby suggesting that her comprehension of her tax obligations was not as limited as she claimed. Second, and more important, it showed that petitioner knew there was some alternative to answering the IRS agents' questions falsely. Her knowing lies during the interview regarding her income during 1973 and 1974 therefore could not have been merely the product of ignorant adherence to the advice of counsel. Petitioner knew that she was not required to answer each of the agents' questions, and yet she lied in response to several important inquiries concerning her financial affairs during 1973 and 1974. This tended to negate petitioner's good-faith defense.

A defendant's exercise of his constitutional privilege against compulsory self-incrimination is admissible against him when it is relevant to matters such as the defendant's state of mind or his understanding of proceedings in which he is involved. See, *e.g.*, *United States* v. *Trujillo*, 578 F. 2d 285, 288 (10th Cir.), cert. denied, 439 U.S. 858 (1978); *United States* v. *Two Bulls*, 577 F. 2d 63, 66 (8th Cir.), cert. denied, 439 U.S. 931 (1978); *United States* v. *Conlin*, 551 F. 2d 534, 537 (2d Cir.), cert. denied, 434 U.S. 831 (1977). Cf. *Mercado* v. *Massey*, 536 F. 2d 107 (5th Cir. 1976). Here, an unusual combination of circumstances justified the introduction of the IRS agent's disputed testimony in the

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[2]The relevant testimony occupies one page of a trial transcript that contains more than 800 pages.

government's direct case. First, defense counsel had already announced the nature of petitioner's intended defense. Second, that defense turned entirely on the extent to which petitioner had acted willfully, on the one hand, or in good faith on the advice of her attorney, on the other. Third, petitioner's mixed performance during the May 1977 IRS interview showed that she knowingly answered certain critical questions falsely, even though she knew that another non-incriminating alternative was available. This in turn tended to discredit petitioner's defense that, in failing to pay her taxes and in making a false statement on her immigration form, she acted unwittingly on the advice of counsel and therefore did not have the criminal intent necessary for conviction. If petitioner had not asserted the Fifth Amendment privilege at all, or if she had asserted it repeatedly in response to every question bearing on her tax liability, her "advice of counsel" defense arguably would have been more plausible. Her actual conduct, however, served only to confirm the government's other clear evidence of willfulness.

Review in the present case is not warranted, not only because the district court's evidentiary ruling was correct and involved a peculiar situation that does not arise frequently, but also because the government's remaining evidence was so strong and petitioner's defense so implausible. The government proved that during 1973 and 1974 petitioner earned large amounts of money that she did not report and on which she did not pay taxes. In addition, the government showed that, when directly questioned about this income by IRS agents, petitioner falsely denied its existence. Petitioner's willingness to dissemble was further demonstrated during her own testimony when she resisted characterization as a prostitute, notwithstanding the testimony of numerous government witnesses who stated that they had paid petitioner for her sexual favors (see Tr. 668-671). On direct examination, petitioner stated (Tr. 551-559) that she is a university graduate and that, in addition, she

has taken numerous college-level courses in the United States, including some at Hunter College and Columbia University. Petitioner's own summary of her educational background thus further belied her proffered defense. Under these circumstances, there is no reasonable possibility that the district court's alleged error in the admission of testimony concerning petitioner's invocation of her Fifth Amendment privilege could have affected the jury's verdict.

2. Petitioner's contention (Pet. 54-65) that the district court imposed an improper sanction for defense counsel's violation of the reciprocal discovery provision of Fed. R. Crim. P. 16 is also without merit.

One of the government's witnesses at trial was IRS Agent Hans Seidemann. Agent Seidemann testified that on December 23, 1975, he sent petitioner a letter requesting that she contact him concerning her failure to file any tax returns for 1973 and 1974. He further stated that he received no response to this letter or to a follow-up letter (Tr. 418-420).

During cross-examination, petitioner's counsel produced for the first time a copy of a letter purportedly sent by petitioner's former attorney to Agent Seidemann in response to the agent's letter of December 23, 1975 (Tr. 478). In this letter (Def. Exh. B; Pet. App. 15a), petitioner's former attorney stated that petitioner was a student supported by her parents and therefore was not required to file tax returns. This was the advice on which petitioner contended she had relied in not reporting her income and not paying taxes.

The government objected to the use of the letter on the ground that petitioner's counsel had failed to produce the letter in response to the government's timely reciprocal discovery request. The district court ruled that defense counsel had improperly withheld the letter from the government and that it therefore should be excluded from evidence

(Tr. 481). Later, however, during petitioner's direct examination, the district court admitted on petitioner's motion not only this letter but also four other letters never before shown to the government (Tr. 570-590). Subsequently, prior to closing argument, the court ruled that, as a sanction for failing to produce these materials in accordance with the reciprocal discovery provision of Rule 16, petitioner's counsel would be precluded from arguing to the jury that they could infer that the letter purportedly sent to Agent Seidemann was genuine because the government's "vast investigative authority" had not produced any evidence suggesting that the letter was a fabrication (Tr. 802-814).

Rule 16(b)(1)(A) provides that, upon request by the government and upon completion of the government's own discovery obligations, the defense must disclose and produce before trial any books, papers, documents, photographs, or tangible objects that the defendant intends to introduce as evidence in chief at the trial. Petitioner now asserts (Pet. 54-55) that her attorney never intended to introduce Defense Exhibit B (*i.e.*, the letter to Agent Seidemann) into evidence and that therefore the obligation imposed by Rule 16(b)(1)(A) was inapplicable. This blatant misstatement is conclusively refuted by the record. At trial, in response to the prosecutor's assertion that defense counsel had violated the reciprocal discovery rule, petitioner's attorney never once suggested that he did not intend to use the letter as evidence in chief at trial.[3] On the contrary, counsel stated that the letter was "essential to our defense" (Tr. 481). Counsel referred to the letter as part of petitioner's "affirmative defense" and characterized it as "the heart

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[3]Petitioner's counsel variously explained his failure to produce the letter on the grounds that he had obtained it only recently (Tr. 479), that the government had not fully complied with his discovery requests (*ibid.*), and that the letter was protected by the attorney-client privilege (Tr. 629).

of our defense" (Tr. 482). The defense plainly intended to introduce the letter as evidence in chief at trial and cannot avoid the requirements of Rule 16(b)(1)(A) merely because it first sought to use the letter during cross-examination of a government witness (*i.e.*, Agent Seidemann).

Likewise, petitioner's argument that the district court imposed an inappropriate sanction is insubstantial. Under Rule 16(d)(2), a district court may remedy a violation of the Rule's discovery provisions by entering any order "it deems just under the circumstances." Here, petitioner's counsel explicitly agreed with the court's determination that he had deliberately violated Rule 16(b)(1)(A) (Tr. 802). Counsel stated that he had made a deliberate decision not to turn over the letter (Tr. 811-812, 814). In these circumstances, the district court was justified in finding that petitioner had deliberately thwarted the government's opportunity to investigate the genuineness of the letter and for that reason should be precluded from arguing to the jury that the letter's authenticity could be inferred from the government's failure to adduce contrary evidence. Defense counsel was permitted to respond to the government's contention that the document was a fraud and to argue fully the significance of the letter. Thus, despite her insistence that she was wrongly prejudiced (Pet. 57-64), petitioner suffered no overburdening sanctions for her counsel's violation of Rule 16; indeed, the district court's resolution of the problem was generous to her under the circumstances. The record is clear, as the court of appeals held (Pet. App. 3a), that the sanction imposed was modest considering counsel's deliberate flouting of the discovery rule.[4]

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[4]Petitioner's allegations (Pet. 38-44, 66-67) of judicial misconduct have no basis in the record, and the court of appeals found it unnecessary even to comment on them. In view of counsel's deliberate refusal to comply with Rule 16, his inconsistent, if not mendacious, explanations for his failure in that regard, and his generally obstreperous conduct at trial, it is little wonder that the trial judge may at times have grown

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

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exasperated with the behavior of petitioner's attorney. A review of the transcript shows that the judge repeatedly displayed remarkable patience in considering and reconsidering the arguments advanced by defense counsel. Indeed, although petitioner has levelled many accusations, she has failed to provide a single record citation to an alleged instance of judicial misconduct.

DOJ-1981-06